No. 98-1316

In the Supreme Court of the United States

OCTOBER TERM, 1998

ENERCON GMBH,

Petitioner,

v.

UNITED STATES INTERNATIONAL TRADE COMMISSION, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF RESPONDENT-INTERVENOR ZOND ENERGY SYSTEMS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner's "Statement of the Case" is inappropriate in that it presents a distorted picture of the facts found against it. Indeed, much of petitioner's Statement is dedicated to rearguing the facts (*see* Pet. 4-6 & nn.4-6), which is an approach that only serves to foreshadow the fact-bound nature of petitioner's argument (*see* section I(C) *infra*). The following Statement of the Case is therefore offered to provide a straightforward report of the facts that were found at the agency below and affirmed by the Federal Circuit, and that should be accepted by this Court.

A. The Administrative Proceedings

On May 23, 1995, the United States International Trade Commission ("ITC") initiated an investigation under 19 U.S.C. § 1337 ("section 337") based on a Complaint filed by Kenetech Windpower Corporation ("KW"). Complainant KW was a U.S. company that, at that time, manufactured variable speed wind turbines and was the owner of U.S. patents related to wind power.[1] Based on the complaint, the ITC named two respondents to the investigation: (1) Enercon GmbH ("Enercon," which is the petitioner in this Court), a German wind turbine manufacturer which at that time had a sales representative in the United States; and (2) The New World Power Corporation ("NWP"), a U.S. company engaged in the development of wind power projects in the United States.

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[1] KW filed for protection under Chapter 11 of the U.S. Bankruptcy Act in 1996. Zond Energy Systems, Inc. subsequently acquired KW's patents in issue, was ultimately named a co-complainant with KW during post-hearing proceedings at the ITC, and intervened as a party in the appeal at the Federal Circuit.

The complaint alleged that Enercon and NWP had violated section 337 by means of the sale for importation of Enercon's German-made variable speed wind turbines which were alleged to infringe two patents. One of the patents was U.S. Patent 5,083,039 ("the '039 patent"), which was then owned by KW and is now owned by Zond Energy Systems, Inc. ("Zond," which is the respondent-intervenor in this Court). The investigation specifically inquired into Enercon and NWP's planned importation and installation of eighty Enercon model E-40 variable speed wind turbines for a NWP wind energy project for the Texas Utilities Company ("Texas Utilities") at Big Spring, Texas.

Commencing on January 31, 1996, a five-day evidentiary hearing was held before the ITC's administrative law judge ("ALJ"). On May 30, 1996, the ALJ issued his initial determination, in which he concluded that there had been a sale for importation of Enercon E-40 wind turbines and that the E-40 wind turbines operated to infringe the '039 patent.

The ALJ's conclusion that there had been a sale for importation was supported by sixty-one separate factual findings. Those findings detailed what the ALJ termed a "long and well-established course of conduct" between Enercon and NWP with regard to the sale of Enercon's wind turbines for importation and use in NWP's Big Spring project. (Pet. App. 49a.) Correspondence and meetings between Enercon and NWP reflected that from as early as 1993, Enercon sought to sell, and NWP sought to buy, E-40 wind turbines for use in the United States. (*Id.* at 49a-50a.) Enercon's owner, Aloys Wobben, had since that time been offering to sell E-40 wind turbines in large quantities for U.S. installation. (*Id.*) NWP's CEO, John Kuhns, and Mr. Wobben held face-to-face discussions regarding the

advantages of the E-40 technology and Enercon's ability to meet NWP's requirements for wind turbines. (*Id.* at 50a-51a.)

In connection with the Texas Utilities project in Big Spring, Texas Enercon's export manager provided Enercon's U.S. salesman with a price for the sale of E-40 wind turbines. (*Id.* at 51a.) NWP used that price in submitting a bid to Texas Utilities for the project, and specified in its bid that NWP would use E-40 wind turbines. (*Id.* at 51a-52a.) Enercon and NWP confirmed the E-40 wind turbines would be imported from Germany for the project and Enercon obtained quotes for shipping the wind turbines from Germany to Big Spring. (*Id.* at 54a, 69a.) In furtherance of NWP's bid to Texas Utilities, Enercon's U.S. salesman met with Texas Utilities to field questions about the E-40. (*Id.* at 52a.)

Zond's predecessor-in-interest, complainant KW, also submitted a bid to Texas Utilities for its Big Spring project. KW's bid was based on the use of its own wind turbines which practiced the invention embodied in the '039 patent then-owned by KW. Texas Utilities rejected KW's bid in favor of NWP's bid, which was based on the use of the infringing Enercon E-40 wind turbines. Texas Utilities awarded the contract for the Big Spring project to NWP in partnership with Enercon. (*Id.* at 53a.)

NWP subsequently signed an energy purchase agreement with Texas Utilities specifying that E-40 wind turbines would be the wind turbines employed by NWP in the project. (*Id.* at 54a.) The parties' written purchase order confirmed the parties' agreement for the provision of E-40 wind turbines for the project. (*Id.* at 55a.) NWP began securing financing and, prior to the completion of the ITC

investigation, obtained final project approval from the Texas Public Utilities Commission. (*Id.* at 57a.) Enercon treated the award of the Texas project as a victory for Enercon as well as for NWP. (*Id.* at 54a.)

Based in part on these facts, the ALJ's initial determination concluded that Enercon and NWP had violated section 337 by means of a sale for importation and that, absent ITC intervention, Enercon would not refrain from sending the infringing E-40 wind turbines into the United States. (*Id.* at 59a.) The ITC adopted the ALJ's initial determination with minor modification not relevant here, and in particular concurred in the ALJ's conclusion that there had been a sale for importation of infringing wind turbines in violation of the statute.

B. Proceedings at the Federal Circuit

Enercon appealed, among other things, the ITC's decision that there had been a sale for importation in violation of section 337. Enercon argued (as it had in the ITC below and as it does again here) that delivery had not yet taken place, and that the ITC consequently lacked jurisdiction to exclude the infringing wind turbines. The Federal Circuit fully considered and rejected Enercon's arguments. In analyzing the issues on appeal, the Federal Circuit agreed with the ITC that Congress intended that the ordinary meaning of the term sale should inform the interpretation of sale for importation, as that term is used in section 337. (Pet. App. 9a.) The Federal Circuit then looked to appropriate dictionaries, caselaw and the Uniform Commercial Code to inform that ordinary meaning. (*Id.* at 9a-10a.) Based on that approach, the court concluded that it was common for a sale to be completed even though delivery is to take place in the

future. (*Id.* at 10a.) Therefore, the court held that immediate delivery was not required for there to be a sale or for the ITC to assume jurisdiction to hear the case and enter its exclusion order. (*Id.*)

The Federal Circuit also addressed the facts as found by the ALJ and adopted by the Commission concerning Enercon and NWP's activities directed toward the planned installation of Enercon E-40 wind turbines for Texas Utilities' Big Spring project. (*Id.* at 5a-7a, 13a.) After recounting the facts concerning Enercon and NWP's activities with respect to the project, the court held that the evidence fully supported a conclusion that Enercon and NWP had formed a contract for sale of the infringing German-made wind turbines. (*Id.* at 13a.) Accordingly, the Federal Circuit affirmed the ITC's determination that there had been a sale for imporation. (*Id.* at 1a.) The Federal Circuit denied petitioner's petition for rehearing and suggestion for rehearing *en banc* on November 16, 1998. (*Id.* at 19a.)

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner asks this Court to review the decision below because it argues that: (1) there is a conflict within the Federal Circuit concerning both the Federal Circuit's interpretation of the term "sale" and the Federal Circuit's application of the analysis set forth in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); (2) the Federal Circuit erred in what petitioner terms the court's rejection of a requirement that accused goods under section 337 have minimum contacts with the United States; and (3) the decision below is counter to public policy. None of those arguments is well-founded or presents an issue warranting review by this Court. The intracircuit conflict

alleged by petitioner is non-existent, and, even if it existed, should be resolved by the Federal Circuit itself. The Federal Circuit did not in fact disturb any requirement that minimum contacts be satisfied. And public policy considerations fully support the decision below. Moreover, petitioner's request amounts to an inappropriate invitation for this Court to become enmeshed in a consideration of facts already thoroughly addressed by both the administrative agency and Federal Circuit below. Accordingly, the writ should be denied.

I. THIS CASE SATISFIES NONE OF THE ACCEPTED CRITERIA FOR THIS COURT TO GRANT CERTIORARI

A. There Is No Conflict Even Within The Federal Circuit

Petitioner Enercon's request for certiorari rests on strained attempts to manufacture a conflict between two unrelated decisions of the Federal Circuit: the antidumping case *NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997), and the patent-based decision below, *Enercon GmbH v. International Trade Commission*. Petitioner suggests that in *NSK*, when addressing the calculation of dumping margins, the Federal Circuit formulated a definition of "sale" that governs and limits all future Federal Circuit interpretations and applications of that term, no matter what statute or what circumstances are involved. Petitioner then contends that the Federal Circuit's decision below in *Enercon* departed from that the *NSK* definition and held "oppositely" when it affirmed the ITC determination that there had been a

"sale for importation" of petitioner's infringing wind turbines under 19 U.S.C. § 1337 ("section 337"). (Pet. 8.)

Petitioner's argument fails for at least three reasons. First, the two decisions do not even address the same "sale" issue. Second, the very language of *NSK* (as well as common sense) dictates that the Federal Circuit in *NSK* did not establish a definition of "sale" for all purposes. Third, the analytical framework that the Federal Circuit applied in rendering the decisions in *NSK* and *Enercon* is the same. Accordingly, Petitioner's argument is utterly without merit because the conflict alleged is an illusion, as the Federal Circuit itself implicitly recognized in denying without dissent petitioner's request for rehearing and suggestion for rehearing *en banc*.[2]

1. *NSK* and *Enercon* Concern Different Issues

The *NSK* opinion concerned the interpretation and application of antidumping laws designed to impose additional duties on imported merchandise sold in the United

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[2] Petitioner had thrice detailed to the Federal Circuit the alleged conflict with *NSK*: in its Reply Brief on appeal; in its oral argument; and in petitioner's Combined Petition For Rehearing And Suggestion For Rehearing En Banc. Petitioner now takes the Federal Circuit to task for "not even acknowledg[ing]," in the *Enercon* decision, what petitioner terms "the *NSK* precedent." (Pet. 10 n. 10.) But it seems clear that in declining to address *NSK*, the Federal Circuit was simply signaling that not only was *NSK not* precedential here, but that it was so completely inapposite as to be unworthy of mention. Indeed, petitioner itself never cited *NSK* as precedent before the ITC, and did not cite *NSK* before the Federal Circuit *until its Reply Brief*, when it apparently discovered and raised this supposed precedent for the first time.

States at a price which is less than its fair market value. 115 F.3d at 968; 19 U.S.C. § 1673. The additional duties are quantified by means of a calculated "dumping margin," which is the amount by which the foreign market value of the merchandise exceeds the United States price for the merchandise. 115 F.3d at 968. In *NSK*, a Japanese exporter and its importer appealed a Court of International Trade decision sustaining the Department of Commerce's calculation of dumping margins for imported antifriction bearings. *Id.* at 967-68. In calculating the United States price component of the dumping margins, Commerce had examined the sales of the imported bearings in the United States, and had included as sales certain transactions in which the importer had *given* sample bearings to its U.S. customers *free of charge* (*i.e.*, Commerce had considered them "sales" at zero U.S. price). *Id.* at 971.

As such, the only "sale" issue adjudicated in the *NSK* appeal was whether providing the free samples to potential U.S. customers should have been treated as a "sale" within the meaning of the antidumping law. Because the samples were transferred to customers, the government had argued that a sale had occurred notwithstanding that the customers had not paid for the samples. *Id.* at 974. The Federal Circuit disagreed because such gifts involve no consideration. *Id.* In the context of applying the antidumping statute to the free sample situation at hand, the court stated "[w]e conclude that the term 'sold,' as used in 19 U.S.C. §§ 1673 and 1677a(c), requires both a transfer of ownership to an unrelated party and consideration." *Id.* at 975. In short, free samples were held not to constitute sales for antidumping calculation purposes.

The present *Enercon* case involves no such issue. Rather, it concerns the interpretation and application of a

provision in section 337 that protects U.S. intellectual property rights. Section 337 proscribes, *inter alia*, the "sale for importation . . . of articles that infringe a valid and enforceable United States patent." 19 U.S.C. § 1337(a)(1)(B). As a remedy, the section permits the ITC to enter an order excluding such infringing articles from entry into U.S. commerce. After a full hearing on the merits, the ITC's ALJ determined in the *Enercon* case that: (1) the operation of petitioner Enercon's wind turbines infringed a U.S. patent; and (2) petitioner's wind turbines had been the subject of a sale for importation according to an agreement between petitioner and NWP by which petitioner, in exchange for payment, would provide its German-made wind turbines to NWP for NWP's Texas windpower project. (Pet. Lodg. 19, 58-59.)

The relevant issue on appeal in *Enercon* was whether a "sale for importation" under section 337 had occurred so as to give the ITC jurisdiction to enter the exclusion order. (Pet. App. 7a-10a.) Petitioner argued that a "sale for importation" required immediate delivery of title and control of the wind turbines from petitioner to NWP, but that such delivery had not yet occurred. (*Id.* at 10a.) The Federal Circuit determined that immediate delivery was *not* necessary because a sale includes a contract in which the parties agree to give and pass rights of property for consideration, even though delivery is to be made in the future. (*Id.*) The facts established the "sale for importation" by establishing the existence of such a contract between petitioner and NWP. (*Id.* at 12a.)

Petitioner's insistence that the *Enercon* court held "oppositely" to *NSK* (Pet. 8, 9) is disingenuous. Rather than being "opposite," or even "inconsistent" (*id.*), the cases adopted the *same analytical method* in that they both

assessed the ordinary meaning of the term "sale" through resort to relevant dictionaries, caselaw, and other appropriate sources. *See* section I(A)(3) *infra*. However, *the factual issues addressed* were different in each case. The opinion in *NSK* was tailored to address whether *the giving of free samples* can be considered a sale. 115 F.3d at 972-75. Despite petitioner's strained arguments, *NSK* simply did not address *Enercon*'s issue of whether *immediate delivery* of title and control is required for there to be a sale. Indeed, petitioner's argument is so inherently flawed that, even while arguing that the case below is irreconcilably in conflict with *NSK*, petitioner simultaneously finds itself contending that the case below is one of first impression. (Pet. 13 n.12.)

2. The Federal Circuit in *NSK* Did Not Establish an All-Purpose Definition of "Sale"

Contrary to petitioner's assertion, *NSK* simply did not forever establish a generic definition of "sale" which the Federal Circuit bound itself to apply in all circumstances and for all purposes no matter how different from those addressed in *NSK*. That is readily apparent from the very language of the *NSK* statement on which petitioner here relies. In the context at issue in *NSK*, the Federal Circuit stated that a sale requires "an unrelated party." *Id.* at 975.[3] If that were truly an all-purpose definition, it would lead to the anomalous result that transactions between "related parties" could never be considered sales. Under that view, the *Enercon* case could have turned on whether petitioner and NWP were "related,"

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[3] In the antidumping context, whether the exporter/seller and the importer/buyer are "related parties" affects the calculation of the dumping margin. 115 F.3d at 968.

an issue no more pertinent to resolution of the *Enercon* case than the gift issue resolved in *NSK*. What this demonstrates is that petitioner's attempt to require all sales to be judged according to the contextual language of *NSK* is completely without merit, for it would unnecessarily and illogically impose a straightjacket on the Federal Circuit's ability to interpret the meaning of the term "sale" in differing factual and legal contexts.

3. The Analytical Framework Applied in the *NSK* and *Enercon* Decisions Is the Same

In a further attempt to fashion a conflict with *NSK*, petitioner asserts that the *Enercon* court below strayed from the analysis dictated by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) and applied by the *NSK* court. That argument is without merit, for in both *NSK* and *Enercon*, the Federal Circuit applied the first step of *Chevron* to conclude that the construction given to the term "sale" was the proper one in each case.

It is undisputed that, in the case below, it was appropriate for the Federal Circuit to apply the analysis set forth in *Chevron* to address the ITC's determination that there had been a "sale for importation" under section 337. Pursuant to *Chevron*, a court reviewing an agency's interpretation of its statute is to consider "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. Where Congress's intent is clear, then that intent must be given effect. *Id.* at 842-43. If Congress's intent is unclear because the "statute is silent or ambiguous with respect to the

specific issue," the court must then consider whether the agency applied a reasonable construction of the statute in resolving the issue. *Id.* at 843.

In the case below, the Federal Circuit had to consider whether the ITC was correct in holding that a "sale for importation" did not require immediate delivery of title and control of the infringing articles. Petitioner contends that in doing so the Federal Circuit "abjured" *NSK's Chevron* analysis. (Pet. 9.) According to petitioner, when addressing the first *Chevron* question, the Federal Circuit "camouflaged the fact that" the sale issue in *Enercon* was (in petitioner's opinion) "the precise question decided in *NSK.*" (*Id.* at 10.) Because the court below clearly did not agree with petitioner's contention that *NSK* and *Enercon* contained the same "sale" issue, petitioner now accuses the court of electing "to finesse" the first *Chevron* question and proceeding directly to the second *Chevron* question of whether the ITC's construction of "sale" under section 337 was reasonable. (*Id.*) Petitioner's accusations are groundless.

First, as explained in section I(A)(i) above, *NSK* and *Enercon* address different issues so the *Enercon* court was not bound by *NSK's* contextual treatment of the term "sale." Second, and contrary to petitioner's assertions, the analytical framework that the Federal Circuit applied in rendering the opinions in *NSK* and *Enercon* did not differ.

In both cases the Federal Circuit applied a *Chevron* analysis to review the respective agencies' determinations of whether the term "sale" could be applied to the factual situation before the court. In *NSK,* the court in its *Chevron* analysis considered whether Congress intended a sale under the statute at hand to include a gift; in *Enercon,* the court in

its *Chevron* analysis considered whether Congress intended a sale under the (different) statute at hand to require immediate delivery. In both cases, the court thus addressed the first *Chevron* question of whether Congress had spoken to the issue by defining the term "sale" in the statute at hand. 115 F.3d at 972-73; (Pet. App. 9a). And in both cases the court determined that, although "sale" was not specifically defined in the statute, Congress intended to give the term its ordinary meaning in context. 115 F.3d at 974; (Pet. App. 9a). Moreover, to inform this ordinary meaning, the court in both *NSK* and *Enercon* below applied the same method of analysis, looking to appropriate dictionaries as well as caselaw and other authority relevant to that context. 115 F.3d at 974-75; (Pet. App. 9a-10a). Based on that common approach, the court was completely consistent in reaching its conclusion in *NSK* that the giving of free samples were not sales, 115 F.3d at 975, and its conclusion in *Enercon* that immediate delivery was not required. (Pet. App. 10a.)

Petitioner, without justification, asserts that the Federal Circuit misapplied *Chevron* in *Enercon* below. Petitioner argues that the court assessed only the "reasonableness" of the ITC's construction of the term "sale for importation" (and thus addressed only the second step in the *Chevron* analysis). Petitioner's argument is based on its misinterpretation of the Federal Circuit's opinion. In that opinion, the court clearly applied the first *Chevron* step to *conclude* that the ITC's construction was in accordance with Congress's intention since the "ordinary meaning" of the term sale "includes those situations in which a contract has been made between two parties who agree to transfer title and possession of specific property for a price." (*Id.* at 9a.) Looking at the relevant authorities, the court noted that "[i]t is common for a 'sale' to be completed even though delivery is to be made in the future," and ultimately concluded that

"[t]he term 'sale' in section 337 . . . does not require an immediate 'delivery' of the goods." (Pet. App. 9a-10a.)

Although in its *Enercon* opinion the court *did additionally* discuss the reasonableness of the ITC's interpretation of the term sale for importation, it was not required to do so in order to reach its conclusion that the ITC's construction was the proper one. Rather, the opinion demonstrates that the court examined reasonableness only in the context of *refuting* petitioner's misguided argument that the legislative history surrounding the term "sale for importation" indicated an intention by Congress to limit the ITC's jurisdiction under section 337.[4] Undoubtedly, if the court had not addressed petitioner's legislative history argument, petitioner clearly would have complained about that as well. In short, petitioner's accusations regarding the court's *Chevron* analysis are demonstrably part of its strained attempts to set up a false conflict with *NSK*. They do not rise to the level of an issue warranting this Court's review.

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[4] In the passage relied on by Enercon here, the Federal Circuit expressly was addressing and rejecting Enercon's argument by noting that "the ITC's construction of the phrase 'sale for importation' is not inconsistent with the legislative history of section 337, as suggested by Enercon." (Pet. App. 11a.) The court concluded that "[c]ontrary to Enercon's assertion, . . . in passing the 1988 amendments . . ., Congress did not intend to weaken the ability of the ITC to prevent unfair acts by including an additional limitation on its jurisdiction." (*Id.*)

B. An Alleged Intracircuit Conflict Does Not Warrant Certiorari In Any Event

Even if petitioner's imagined conflict were real, the petition should still be denied. The alleged conflict is within a single circuit, and it is appropriate to permit that circuit in the first instance to harmonize or otherwise redress perceived conflicts in its opinions. *See Davis v. United States,* 417 U.S. 333, 340 (1974) (noting certiorari was denied where conflict was an intracircuit one to be resolved by the Court of Appeals itself); *Wisniewski v. United States,* 353 U.S. 901, 902 (1957) ("it is primarily the task of a Court of Appeals to reconcile its internal difficulties"); Justice Harlan, *Manning the Dikes,* 13 Record of N.Y.C. Bar Assn. 541, 552 (1958) ("decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself") (cited in Robert Stern, *et al., Supreme Court Practice* 176 (7th ed. 1993)). This principle is particularly apt here, where the alleged conflict is within the Federal Circuit, a court having exclusive appellate jurisdiction over the subject matter of the allegedly conflicting cases,[5] and where the claim of conflict is ill-formed and speculative.

The proper procedure for resolution of an alleged intracircuit dispute is through an *en banc* sitting of the court of appeals or through the development of subsequent decisions elucidating the reasoning of earlier decisions. *See* Fed. R. App. P. 35(a) (*en banc* sitting appropriate to secure uniformity of circuit's decisions); *Manning the Dikes,* 13

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[5] 28 U.S.C. §§ 1295(a)(5)-(6).

Record of N.Y.C. Bar Assn. at 552 (intracircuit differences are to be settled through "later panels customarily deferring to the decisions of earlier panels"). And here, the fact that the Federal Circuit unanimously declined to rehear the case or rehear it *en banc*, despite petitioner's full elaboration of its *NSK* theory, further indicates that there is no conflict at all.

In any event, the Federal Circuit would be the appropriate court to resolve the conflict if there were one. The Federal Circuit is by Congressional design the only Federal Court of Appeals with a jurisdiction "defined in terms of subject matter rather than geography." S. Rep. No. 97-275, at 3 (1981); *United States v. Fausto,* 484 U.S. 439, 465 n.11 (1988) (Stevens, J. dissenting). By granting the Federal Circuit exclusive jurisdiction over defined legal areas, Congress sought to increase the uniformity of decisions in those areas and thereby alleviate the burden on the Supreme Court. S. Rep. No. 97-275, at 3 (1981). Because of the Federal Circuit's special jurisdiction, it has a particular expertise in the subject matter entrusted to it, and a particular motivation for developing consistency among its decisions. *See Fausto*, 484 U.S. at 465 n.11 ("[b]ecause its jurisdiction is confined to a defined range of subjects, the Federal Circuit brings to the cases before it an unusual expertise that should not lightly be disregarded"). Accordingly, the Federal Circuit is ordinarily the proper body to resolve genuine conflicts within the circuit.

That conclusion is especially true here because even if one were to accept petitioner's erroneous theory that *NSK* and *Enercon* are in conflict, the conflict is new and its contours are speculative. The only two cases involved are less than two years old. The cases concern differing facts, differing subject matters, and differing sales issues. The purported discord between them is at best still unclear. The

Federal Circuit should therefore be permitted the opportunity to harmonize any purported discord through an appropriate subsequent case in which the alleged conflict is sharply defined.

C. Petitioner's Argument Is Fact-Bound

Petitioner seeks to cast its grievance as a legal one, but it is clear from petitioner's presentation that the true gravamen of its argument hinges on facts that were considered at length by both the ITC and the Federal Circuit and resolved against petitioner. As the ALJ detailed in sixty-one separate factual findings, a long and well-established course of conduct between Enercon and NWP demonstrated that they had firmly agreed that Enercon's wind turbines would be imported and installed in Texas as an integral part of NWP's Big Spring project. . (Pet. App. 12a-13a, 58a-59a.) Those findings led ultimately to the legal determination that a sale for importation had taken place. (*Id.*)

Although petitioner purports to have accepted the findings of fact in this case (Pet. 8 n.8), it extensively reargues the factual determination that Enercon and NWP had an agreement for the supply of wind turbines for the Texas project. Indeed, petitioner's displeasure with the fact finding pervades its discussion of the issues for certiorari. This is evident from its Statement of the Case. (*See* Pet. 4-6 & nn.3-6.) There, in an attempt to cast doubt on the conclusion that the facts demonstrate a sale for importation, petitioner points to eleventh-hour testimony of its owner during the ITC hearing in which he stated his current unwillingness to supply the wind turbines; and to post-

hearing and uncredited statements of NWP to the effect that NWP had had discussions with other wind turbine manufacturers in connection with the Texas project. (*Id.*) Petitioner's desire to reargue the facts is also evident from the conspicuous "bracketed interpolations" that petitioner inserted into its supposed quotation of the Federal Circuit's opinion for the purpose of presenting a distorted impression of the decision below.[6] Through them, petitioner seeks to create the mistaken impression that petitioner and NWP's dealings with respect to the wind turbines were ephemeral.

The facts found by the ITC and adopted by the Federal Circuit, however, pointedly and conclusively demonstrate Enercon and NWP's firm agreement for the supply of imported Enercon wind turbines for the Texas project. (Pet. App. 5a-7a, 62a-71a.) Moreover, the eleventh-hour statements of Enercon's owner and NWP on which petitioner relies (Pet. 4-6 & nn.4-6) prove only that when facing entry of an exclusion order, NWP and Enercon might very well have sought to abandon their firm arrangements to use the E-40 wind turbines. But that had no bearing on whether a sale for importation in violation of section 337 had already taken place. The evidence presented completely

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[6] The quoted material, with petitioner's bracketed interpolations, is as follows:

> Plainly, the common, or usual meaning of the term sale includes those situations in which a contract has been made between two parties who agree to transfer *[at an indeterminate future time]* title and possession of specific property for a price *[to be agreed upon in the future]*.

(Pet. 8 (quoting, except for the bracketed material, Pet. App. 9a) (emphasis added).)

supported and properly led to the conclusion that a contract had been fully formed between Enercon and NWP and that the wind turbines would have been imported absent an ITC exclusion order. (Pet. App. 13a.) Petitioner's belated attempts to avoid the consequences of the sale for importation were properly rejected below by the ITC and Federal Circuit, and its current attempt to reargue the facts cannot support its request for certiorari.

Indeed, the Court has repeatedly stated that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); *see, e.g., Berenyi v. INS*, 385 U.S. 630, 635 (1967). Here, petitioner's presentation of the legal issue of whether there was a sale for importation is inextricably bound up with petitioner's misguided assertions about and denials of those facts concerning the dealings between Enercon and NWP upon which that legal conclusion was based. As a result, a grant of certiorari here would directly and inappropriately enmesh the Court in a consideration of the fact-finding below.[7]

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[7] Although the "two-court" rule normally concerns situations in which an appellate court has accepted the factual findings of a district court, *see, e.g., Berenyi*, 385 U.S. at 635-36, the rule should apply with equal (if not greater) force in cases involving an appellate court's acceptance of an agency's fact-finding. The policy underlying the rule includes the recognition that the fact-finding body below (here, the ITC) is in the best position to find the facts and, if upheld by the appellate court, will be taken as established in this Court. *See id.*

II. PETITIONER MISCHARACTERIZES THE FEDERAL CIRCUIT'S OPINION AS ONE REJECTING "MINIMUM CONTACTS"

Petitioner terms the opinion below a "repudiation" of "the 'minimum contacts' prerequisite to the attachment of *in rem* jurisdiction over foreign goods." (Pet. 12.) An examination of the opinion, even as quoted by petitioner (*id.* 11 (citing Pet. App. 12a)), reveals that to be a gross mischaracterization.

The Federal Circuit never rejected any principle that minimum contacts between the infringing goods and the United States are necessary for ITC jurisdiction. Rather, what the court did was exactly what petitioner quotes – it rejected petitioner's argument that "delivery of control of the goods to a U.S. domiciliary intending to import them" was necessary for ITC jurisdiction. (*Id.*) Minimum contacts between the infringing articles and the United States may be shown, as they were in this case, by a U.S. sale for importation of those articles evidenced by a long and well established course of conduct; delivery is not required. Petitioner's argument about minimum contacts is simply an attempt to reargue the fact-bound issue of whether there was a sale for importation.

III. PETITIONER'S SPECULATIVE POLICY ARGUMENTS DO NOT SUPPORT CERTIORARI, AND IN FACT, SOUND PUBLIC POLICY SUPPORTS THE DECISION BELOW

Petitioner suggests that certiorari should be granted based on its assertion that patent-based exclusion orders such

as the one here involved will have wide-ranging effect outside of the United States, because word will spread that the foreign manufacturer's infringing goods have been excluded from this country. Petitioner contends that this will harm the manufacturer, because the manufacturer's competitors will launch public relations campaigns warning potential customers in other countries that the manufacturer's goods could similarly be found to infringe foreign counterparts to the U.S. patent. But that argument merely reduces to the assertion that this exclusion order, like any other exclusion order under section 337, has an impact on commerce. It does nothing to elucidate the issue of whether jurisdiction was properly exercised by the ITC below. Further, the putative "public relations campaigns" which petitioner envisions are speculative at best and could, in any event, be countered by the manufacturer's own public relations campaign. They are not a basis for granting certiorari.

Similarly deficient is petitioner's argument that this case will lead to international attacks on section 337 grounded on allegations that the statute's application violates the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). (Pet. 13-16.) Petitioner's own brief notes that TRIPS itself provides a mechanism by which U.S. trade partners can raise formal objections and thereby effectuate changes to section 337 if warranted, and that the mechanism has been used successfully in the past. (Pet. 16.) That mechanism, not the extraordinary review by this Court, should be employed to redress any such international concerns.

Indeed, contrary to petitioner's arguments, sound public policy supports the decision below. Here, petitioner, a foreign wind turbine manufacturer, was able to wrest

business away from competitors by arranging for the sale and importation of its wind turbines for a Texas windpower project. Petitioner's wind turbines operate to infringe a U.S. patent, and the then-current owner of the infringed patent was among the competing wind turbine manufacturers frozen out of the Texas project early-on by petitioner's sales activities.

Petitioner argues that the ITC could lawfully provide no remedy against its infringing wind turbines because, notwithstanding the factual demonstration that petitioner and its U.S. partner had every intention to follow through on their arrangement to use those wind turbines in Texas, the wind turbines had not yet been delivered to petitioner's U.S. business partner. But as this case well illustrates, windpower projects, by their nature, require a long start-up time, involving governmental approvals, the securing of financing and project sites, and the installation of machinery. If petitioner's rationale were accepted, not only would the meaning of the term "sale for importation" be unduly restricted to require immediate delivery of the sold goods, but the authority of the ITC under section 337 would be unduly diminished. Under petitioner's rationale, the ITC would be prohibited from providing a remedy until the infringing wind turbines were virtually up and running in the United States, to the detriment of the U.S. patent holder, the U.S. utility company and its customers, and the U.S. general public. Such a prohibition would unduly restrict the ITC's authority to carry out Congress's intent that section 337 serve as "an effective remedy for the protection of United States intellectual property rights," H. R. Conf. Rep. No. 100-576 at 112 (April 20, 1988), and "beef up [the United States'] arsenal in the fight against an unfair trade practice." 133 Cong. Rec. S 1794-95 (Feb. 4, 1987). Accordingly, contrary to Enercon's unfounded assertions, the public policy considerations weigh in favor of the decision below, and

provide a further reason for denying petitioner's request for review by this Court.

CONCLUSION

For the foregoing reasons, Intervenor Zond respectfully requests that the petition for certiorari be denied.

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